IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1922

NO. 933 261

CITIZENS SAVINGS BANK AND TRUST COMPANY,
Appellant,

vs.

JOSEPH F. SEXTON, as executor of the estate of Quincy D. Chapman, deceased, et al,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

BRIEF OF APPELLANT.

FREDERICK W. DEWART,
Solicitor for Appellant.

LAWRENCE H. BROWN
Of Counsel.

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BRIEF OF APPELLANT.

STATEMENT OF FACTS.

In April, 1922, appellant, a Vermont Corporation, brought this action in equity, in the District Court for the Eastern District of Washington, Northern Di-

vision, to recover on a promissory note and to foreclose a mortgage, securing the same, on lands within the jurisdiction of said Court. Defendant (appellee) Sexton, as executor of the estate of Quincy D. Chapman, deceased, at all times was and is a resident of Washington, as had been Quincy D. Chapman, in his lifetime. Defendants (appellees) Millard F. Chapman and Mrs. H. Ferry were and are residents of Michigan and Ohio respectively, and were joined as defendants solely to bar their rights as heirs of Quincy D. Chapman, deceased, no other relief being asked against either of them. (Record p. 1-5.)

PLEADINGS.

To the original bill of complaint (Record p. 1-7), defendant Sexton, as executor, filed an answer. (Record pp. 7-9.) Thereafter an amended bill of complaint (Record pp. 10-14), to which was attached Exhibit "A" (Record pp. 8-10) was filed; this amended bill being in all material respects the same as the original bill, save certain allegations having to do with citizenship and jurisdiction, were added to the amended bill. (Record pp. 3-4 and 15-16.)

To this amended bill of complaint, all defendants answered, said answer (Record pp. 14-16) containing a plea to the jurisdiction, based on the allegations as

to residence of M. L. Bevis, the assignor of appellant.

The note and mortgage in question was made in 1908 by one J. W. Hays and wife, who thereafter transferred the land covered by the mortgage to Quincy D. Chapman, in his lifetime, and personal judgment against Chapman's estate was asked in the complaint on the theory that Chapman had assumed and agreed to pay the mortgage debt by virtue of certain recitations in a deed of conveyance to him, and by virtue of a written assumption agreement entered into between appellant and said Chapman direct. (Record pp. 8-10.)

The case was tried before the Court which later dismissed the same for want of jurisdiction, in that there was a lack of diverse citizenship. (Record pp. 21-22.) Therefore the facts submitted on the merits of said cause are only of moment as they may effect the question of jurisdiction.

FACTS RELATING TO CITIZENSHIP.

On September 3, 1908, M. L. Bevis, the payee of the note and mortgage in the mortgage described in the pleadings, was and at all times since has been a resident of Spokane, Washington. (Record p. 16.) On September 3, 1908, Bevis then was and for some years had been a member of the firm of Bevis Bros.,

real estate mortgage loan brokers, i. e. engaged in loaning other people's money on real estate security. (Record pp. 29.) Sometimes Bevis Bros. had the loan placed with a lender of moneys before the notes and mortgages were signed, and sometimes they did not have it so placed until afterward. (Record pp. 30.) In the instant case the detail becomes important and is as follows:

The Citizens Savings Bank & Trust Company had had previous business relations with Bevis & Bevis Bros. (who can hereafter be referred to as Bevis), and had bought various mortgage loans from Bevis, all previous to the Hays loan, though Bevis was not appellant's agent. (Record pp. 26.) On September 3, 1908, Bevis took from J. W. Hays and wife, citizens and residents of Washington, a signed application for loan (Exhibit 4), note, (Exhibit 5), (with interest coupons attached) and mortgage (Exhibit 6), though the papers for convenience of figuring were dated September 1st, as was the custom of mortgage brokers. (Record pp. 30.) The application for loan (Exhibit 4) was addressed to and on the form of Bevis Bros., though the note and mortgage ran to M. L. Bevis personally. The application, among other things provided:

> "In the event the loan being applied for not granted, or if the security offered should not prove to be as represented, or if I fail to accept the loan if granted, I agree to pay all expenses incurred

in examining the premises above described and the title thereto and in the negotiation of the loan; if granted, I will, if required, insure any buildings for the benefit of and to the satisfaction of the mortgagee; and I understand that the loan hereby applied for is made upon the representation as to said premises and the title to the same made by me in this application, and I do solemnly declare that the said representations are true in every particular.
Dated this 3d day of September, 1908.

J. W. HAYS."

On the same day (September 3d) Bevis telegraphed appellant as follows:

"Have another choice five thousand loan for James W. Hays on section worth sixteen thousand highly improved; can you take it, answer." (Exhibit 1.)

On the same day (September 3d) Bevis wrote appellant, confirming his wire (Exhibit 2), and inclosing the original loan application, signed by Hays. (Exhibit 4.)

On the same day (September 3d) appellant's directors approved the loan (Record pp. 26-27), and appellant wired Bevis accepting the loan. (Record pp. 26.)

On September 4th, 1908, Bevis wrote appellant confirming the appellant's acceptance (Exhibit 3), and

notifying appellant that draft was being made that day by Bevis on appellant for $3,694.94, which was the face of the Hays loan ($5,000), less $1,305.06, monies of appellant in Bevis hands, and thus appropriated by Bevis to the Hays loan fund, with appellant's approval. (Exhibit 3.)

On the same day (September 4th) Bevis drew on appellant for said $3,694.94, attaching to said draft the J. W. Hays note and deposited same in the Old National Bank of Spokane to the credit of Bevis. (Record pp. 29.) This draft was paid in due course on September 11th, and the note at all times since retained by appellant. (Record pp. 26-27.)

On the next day, September 5th, Bevis paid Hays $1,000.00 on account of the note, and mortgage matter, on September 17th, $1,000.00 more and the balance on September 22d. (Record pp. 31.)

The $1,000.00 paid on September 5th was the first money Hays received on account of the loan application and he did not receive full settlement until all matters of recording mortgage and examination of title had been attended to and approved.

Bevis executed the assignment of mortgage to appellant and after recording same mailed the same to appellant September 28, 1908. (Exhibit 7.)

ASSUMPTION OF MORTGAGE.

On September 19, 1917, nine years after the making of the mortgage, Quincy D. Chapman entered into an extension and assumption agreement with appellant, being set forth as an exhibit to the original and amended bills of complaint. (Record pp. 5-7.) In that agreement for and in consideration of the extension of the mortgage for a term of five years, the various parties, including Quincy D. Chapman, bound themselves to its terms and the terms of the note in the following words:

> "It is further agreed by all the parties hereto that all the other terms, provisions and conditions of the said note and mortgage in and all hereto shall be binding and obligatory upon the respective parties hereto."

SPECIFICATIONS OF ERRORS.

The order of the District Court of the United States for the Eastern District of Washington, Northern Division, dismissing said action (Record pp. 21-22) is erroneous in the following particulars:

1. The Court erred in holding (Record p. 48) that M. L. Bevis was not a mere nominal holder of the note and mortgage, transferred and assigned by him to the appellant and sought to be foreclosed by this

action, and in holding that said Bevis had a beneficial interest therein, or right of action thereon. (Assignments of Error No. 1, Record p. 23.)

2. The Court erred in dismissing said action for want of jurisdiction on the evidence submitted and facts found. (Assignments of Error Nos. 2, 3 and 4, Record p. 23.)

3. The Court erred in dismissing said action for want of jurisdiction as to defendant (appellee) Joseph F. Sexton, as administrator of the estate of Quincy D. Chapman, deceased, he having submitted to the jurisdiction of said District Court. (Assignments of Error, No. 5, Record p. 23.)

4. The Court erred in holding (Record p. 48), that said Bevis was not the agent of Hays and wife, the makers of the note and mortgage, in negotiating with appellant for the $5,000.00 loan in question. (Assignments of Error, No. 6, Record p. 24.)

5. The Court erred in holding (Record p. 49), diversity of citizenship between appellant and appellees did not exist by virtue of the making of the assumption agreement by appellant and said Chapman (deceased) (Record pp. 8 and 9), and set out as an exhibit to the original and amended bill of complaint. (Assignments of Error, No. 7, Record p. 24.)

ARGUMENT.

This appeal involves only the jurisdiction of the District Court from whence it is taken. In order to defeat the jurisdiction of the District Court, the appellees invoked Section 24 of the Judicial Code, which provides:

> "No District Court shall have cognizance of any suit—to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such Court to recover upon said note or other chose in action if no assignment has been made."

To the rule of this statute there is a well defined exception to the effect that where the plaintiff is the first and only holder of the note for value and where the payee of the instrument was a mere broker or agent and never advanced any money to or became a creditor of the maker thereof, the plaintiff, though in form an assignee, is in fact the original creditor and can maintain the suit.

Holmes vs. Goldsmith, 147 U. S. 150;

Commercial Trust Co. vs. Laurens County, 267 Fed. 901;

Kirven vs. Virginia-Carolina Chemical Co., 145 Fed. 288;

Baltimore Trust Co. vs. Screven County, 238 Fed. 834.

The application for the real estate loan was made by Hays and wife to Bevis Bros., whose citizenship does not appear save that M. L. Bevis, a member of that firm, was a resident of Washington. (Record pp. 19, 29.) It was made on the form of Bevis Bros. and was plainly only an application and not binding on any one until accepted by Bevis Bros. This is apparent from the terms of the application (Exhibit 4), such as:

> "In the event the loan being applied for (*be*) not granted or if the security offered should not prove to be as represented or if I fail to accept the loan if granted, I agree to pay all expenses incurred in examining the premises above described and the title thereto AND IN THE NEGOTIATION OF THE LOAN * * *."

While the note and mortgage running to M. L. Bevis were signed concurrently with the application to Bevis Bros., it is apparent that it was the intention of the parties that the papers constituted an application only and that the loan might or might not be granted. It does not appear that the loan was accepted or granted until the premises had been examined and the title examined and approved. This did not occur until September 5th at the earliest, the date the $1000.00 advance was made by Bevis Bros. to Hays. (Record pp. 31.)

It is equally plain that Bevis was made the agent of Hays for the negotiation of the loan, for the application says so. It is beside the question to discuss other deals made by Bevis or what the business custom of the firm was.

That Bevis was the agent of Hays for the sale of the mortgage paper must follow from the facts shown in this case. While the testimony is silent as to any words creating such an agency for such special purpose, it does not follow that such an agency was not created. The testimony of Hays is entirely silent on the subject. The testimony of Bevis is:

> "We were engaged in selling, not buying, mortgage loans. We were what is known as mortgage loan brokers * * * we did not have any arrangement with Mr. Hays that we were going to sell the mortgage and note, but he must have known we had to sell these loans again."
> (Record pp. 19 and 20.)

If Hays knew that Bevis was going to sell this loan and that Bevis always sold his loans, it follows that Hays, by delivering to Bevis, the note and mortgage, clothed Bevis with authority as his agent to dispose of the same. The well established doctrine of agency is that an agency may be shown to exist by implication from the facts, and that words of agency need not be used.

"Leaving a note with a broker gives to the purchaser from the broker the right to rely upon the representation that the broker is the agent of the maker."

Morris vs. Joyce, 63 N. J. Equity, 549; 53 Atlantic, 139-141.

"To our mind the transaction itself speaks louder than words. The facts are undisputed. The defendant drew the note and delivered it to Munson. There is no pretense that Munson paid anything therefor. Munson took the note to N. M. Allen & Son and transferred it to the firm by an assignment upon the back thereof. He did not in any manner endorse it so as to become liable thereon. * * * Allen & Son drew their draft for the amount—and delivered it to Munson. Munson took the draft and delivered it to the defendant who drew the money thereon."

Above quoted from Allen vs. Henry, 81 Hun. 241; 30 N. Y. Supp. 773, in which the Court holds the person so procuring money for another was his agent or at the least that the trial Court would be justified in so finding.

The facts in the case at bar are very similar to those set forth in Allen vs. Henry, Supra. In fact the only difference in facts is that the proceeds, instead of being delivered to Hays by Bevis by means of a draft or remittance signed by appellant, were delivered to Hays in the shape of checks by Bevis, representing

funds delivered to Bevis by appellant for that purpose.

On receipt of the note and mortgage, Bevis was not a holder for value for no value had been given therefor. Until the consideration to be advanced in the future, in the event of the acceptance of the loan, had been actually advanced to Hays, no right of action would lie on the instruments by Bevis against Hays.

Under the title "Bills and Notes," Ruling Case Law states:

> "In the intermediate time the obligation of the contract or promise is suspended; for until the performance of the condition of the promisee there is no consideration and the promise is *nudum pactum;* but on the performance of the condition by the promisee it is clothed with a valid consideration which relates back to the promise and then becomes obligatory."
>
> 3 *Ruling Case Law*, page 936;
>
> *Miller vs. McKenzie*, 95 New York 575; 47 Am. Rep. 85.

As soon as the first $1000.00 was paid to Hays on September 5th, life was given to the note and mortgage on which a cause of action could later be predicated; but that $1000.00 was paid out of monies belonging to appellant in the hands of Bevis Bros., namely the $1305.06 proceeds of a former deal. Not

until September 17th, long after the draft had been paid by appellant, and the mortgage recorded and assigned of record, was any more money paid to Hays. Certainly it cannot be contended that Bevis was not the agent of somebody in disbursing funds to Hays. The remainder, $2752.51, was not paid to Hays until the mortgage and assignment had been recorded and the title perfected. (Record pp. 17-21.) The loan was accepted by the directors of appellant corporation on September 3rd, and their initials approving it attached to the loan envelope, as was the custom of appellant. (Record p. 18.)

Upon payment of the first $1000, a contractual relation existed between appellant and Hays, whereon a cause of action could arise only in favor of appellant as it was appellant's money.

The suggestion that Hays could have brought suit against anyone until acceptance of the loan is refuted by the plain terms of the loan application. Hays could not force acceptance of the loan but, at best, could have demanded, in due time, a return of his note and cancellation of the mortgage.

The appellant was the original creditor of Hays and was the first and only holder for value of said note.

The cause of action never accrued to Bevis. None did accrue until the money was furnished, and it then accrued to appellant.

Paige vs. Town of Rochester, 137 Fed. 663.

"No cause or right of action against the defendant company arose upon the notes executed by it until the plaintiff Bank advanced the money thereon and the right of action then created never was vested in or belonged to the Union Loan & Trust Company."

Wachusett National Bank vs. Sioux City Stove Works, 56 Fed. 321.

"The petition, as amplified by amendment, alleges that Scarboro Company was the mere broker and agent of Laurens County, employed to sell the notes, and never advanced any money or credit for the notes or became at any time a creditor of the county, which owed no one anything until plaintiff paid its money for the notes to Scarboro Company, as the county's agent. Such facts would constitute the plaintiff, though in form an assignee, in substance an original creditor and as such it could maintain the suit."

Commercial Trust Co. vs. Laurens County, 267 Fed. 901-903.

Such facts may be shown by parol evidence.

Holmes vs. Goldsmith, Supra.

The spirit and purpose of the act should be controlling of this case and that is indicated and defined by this Court as follows:

> "It is quite plain that the plaintiff's action did not offend the spirit and purpose of this section of the act. The purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the Federal Court."

Holmes vs. Goldsmith, 147 U. S. 150;

Chase vs. Sheldon Roller Mills, 56 Fed. 625.

Federal Reserve Bank v. Wilcox 287 Fed 579

In Baltimore Trust Company vs. Screven County, 238 Fed. 834-836, the opinion states the purposes of the act and holds that "the language of the Statute is to be interpreted in accordance with the purpose to be effected and the mischief to be prevented."

In Kolze vs. Hoadley, 200 U. S. 76, Justice Brown stated the following proposition settled by the decisions of this Court:

> "That a suit may be maintained between the immediate parties to a promissory note as indorser and indorsee, provided the requisite diversity of citizenship appears as between them or upon a new contract arising subsequently to the execution of the original, notwithstanding a suit could not have been maintained upon the original contract. In such case the original contract may be considered to ascertain the amount of the damages."

In Power and Irrigation Co. vs. Capay Ditch Co., 226 Fed. 634-641), Judge Gilbert of the Circuit

Court of Appeals for the Ninth Circuit held that the statute in question does not apply "To actions arising upon breach of performance of a contract occurring after its assignment." So in the case at bar no right of action for any deficiency would lie against Chapman, deceased, or his executor, save by virtue of his contract of assumption and this suit, in other words, is an action to enforce his promise.

American Colorotype Co. vs. Continental Colorotype Co., 188 U. S. 104.

Whether or not it should be found that Chapman assumed the mortgage in question by virtue of being a grantee in a deed from Hays, containing an assumption clause; it follows that the rights and intention of the parties were expressed in the contract of September, 1917. (Record pp. 5-7.) Appellant did not become a party to this agreement under any doctrine of subrogation. With full knowledge of their respective rights appellant and Chapman, for a good and valuable consideration, to-wit: The extension of the loan, entered into an independent contract fixing their rights. If this be not such a new contract as will remove appellant from the application of Section 24 of the Judicial Code, it at least shows that the spirit of the act in question has not been violated by the appellant.

We submit that the District Court was in error in dismissing this suit for want of jurisdiction.

Respectfully submitted,

FREDERICK W. DEWART,
Solicitor for Appellant.

LAWRENCE H. BROWN
Of Counsel.

Tredway v. Sanger 107 U.S. 323

Wassman v. Werges 112 U.S. 139

N. Orleans v. Benjamin 153 U.S. 411

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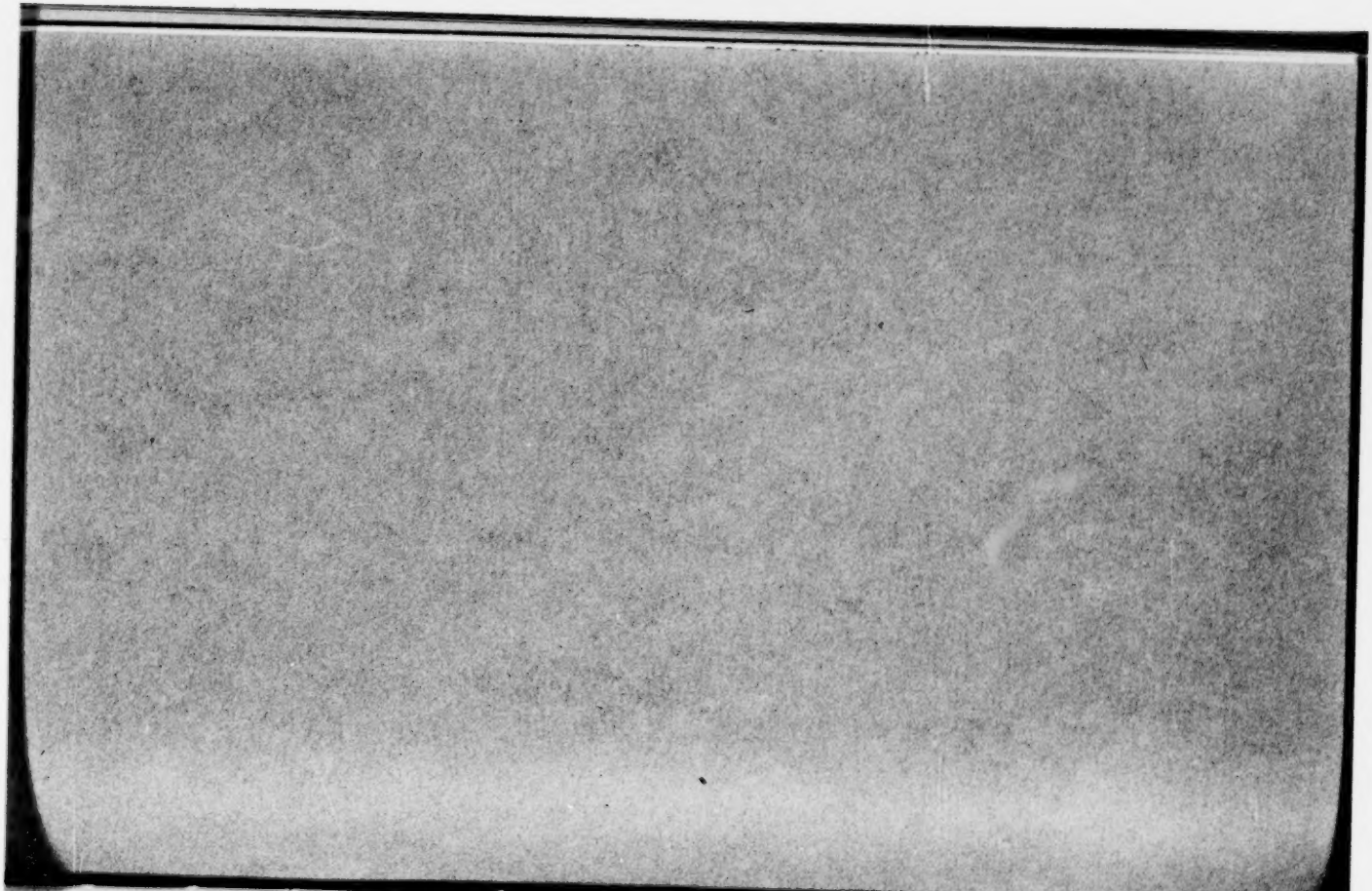
UNION PRINTING COMPANY, SPOKANE



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STATEMENT.

The mortgagors, J. W. Hays and wife, resided at Spokane, Washington. M. L. Bevis, in whose favor the note and mortgage in controversy were executed, and Bevis Brothers, were engaged in the farm mortgage loan business and resided at Spokane, Washington. (Record 29.) Appellant is a citizen

of the State of Vermont. The method in which M. L. Bevis and Bevis Brothers handled notes and mortgages was as follows:

> "When we took them we sometimes knew to whom we would sell them, and sometimes not. We had some money to carry on our business, but we usually kept it pretty well invested. We always had a good bank account. When we took a mortgage—got a mortgage and note—we would offer it for sale to three or four and sometimes half a dozen parties or persons. That could be done either by telegram or letter. When I took this mortgage and note and application I did not know then whether the Citizens Savings Bank & Trust Company would buy it of us or not." (Record 30.)

Appellant's method of doing business with M. L. Bevis and Bevis Brothers was as follows:

> "* * * we would buy securities that were offered us and which appealed to us as being good investments * * * We had arrangements with Bevis that if, after we bought a loan we found it unsatisfactory he would repurchase. So far as our dealings with Bevis were concerned he would make his investments and would send us on the application, and if we saw fit to take it we would wire him, or write him." (Record 28.)

On September 3, 1908, Mr. Hays signed an application to Bevis Brothers for a loan on the property involved in this action. "The loan was made about September 3d." (Record 29, 30.)

It is apparent that the written application for the loan, taken by Bevis Brothers was for the purpose only of furnishing information to the one who might subsequently buy the note and mortgage, since it appears that Bevis was fully advised as to the value of the land, and it was not necessary for him to make an inspection for the purpose of determining whether he would, or would not, make the loan. It was no doubt due to these facts that the making of the application and the note and mortgage were concurrent acts. From the testimony of J. W. Hays it would appear that the mortgagors knew no one in the transaction but Bevis, and were looking solely for the performance of the engagement of the parties to M. L. Bevis and Bevis Brothers. It does not appear that the Hays had any knowledge as to the method by which M. L. Bevis and Bevis Brothers transacted their business. (Record 31.)

From the standpoint of M. L. Bevis, his engagement with Hays was to loan him money, on the security of the note and mortgage. Hays did not know whether Bevis, or Bevis Brothers, would hold the note and mortgage or would sell them. At that time Bevis did not know whether appellant would buy the note and mortgage. The money paid Hays for the note and mortgage came out of Bevis Brothers' general bank account.

> "When we took the note and mortgage we handled it as we saw fit and there was no agreement between us and Mr. Hays that the payment to him was to be depent on whether we sold it, or did not sell it." (Record 30, 31.)

At the time the note and mortgage were delivered, Bevis Brothers were indebted to appellant in the sum of $1300, due to the fact that they had previously sold appellant a mortgage, with which appellant later became dissatisfied and required Bevis Brothers to take it up, under the arrangement that existed between the parties. (Record 28.)

There are some statements in appellant's brief which are not supported by the record. The record does not disclose that Bevis or Bevis Brothers were "engaged in loaning other peoples' money" (Brief 4); nor does the record show that appellant's directors "approved the loan" (Brief 6) on September 3rd, or at any other time. From the record it does appear, inferentially, that appellant's directors at some time approved the purchase made by its officers of the note and mortgage from Bevis Brothers. (Record 27.)

The statement (Brief 7) that on September 19, 1917, Quincy D. Chapman "entered into an extension and *assumption* agreement with appellant," is erroneous. The record does show that the parties entered into an extension agreement, but there is in this document no agreement on the part of Chap-

man, assuming or agreeing to pay the mortgage debt. The pertinent language bearing on this point is the following:

> "That the said J. W. Hays and Lillie G. Hays, his wife, remain liable and bound by the said note and mortgage in all the respective terms and provisions."

The above quoted portion of the extension agreement, Hays and wife being parties thereto, negatives any intention that Chapman was to be personally liable for the debt. If Chapman assumed and agreed to pay this mortgage debt, then as between the parties, Chapman would be primarily liable and Hays would only be secondary liable.

ARGUMENT.

Appellant, for the purpose of sustaining the jurisdiction of the District Court (Brief 17) suggests that the jurisdiction can be sustained on the theory that this was a law action brought on the extension agreement signed by Chapman. If this theory could be sustained, then the action is one at law and not in equity, and the finding of the District Court on all questions of fact is final, if there was any evidence to support the judgment. Dooley v. Pease 180 U. S. 126; City of St. Louis v. Rutz 138 U. S. 226; Runkle v. Burham 153 U. S. 216. Viewed, however, from the standpoint of being an action in equity, which in fact it is, the judgment will not be disturbed un-

less the findings necessary to support the judgment are manifestly erroneous, or manifestly against the weight of the evidence. Hyman v. Trow Directory Printing Co. 261 Fed. (2nd Cir.) 991; Alexander v. Redmond 180 Fed. (2nd Cir.) 92; Weld v. McKay 218 Fed. (7th Cir.) 807; Harper v. Taylor 193 Fed. (8th Cir.) 944; Waterloo Mining Co. v. Doe 82 Fed. (9th Cir.) 45.

In entering the judgment, from which the appeal is prosecuted, the District Court necessarily was required to pass upon the issues of fact: (1) Were the note and mortgage delivered by Hays to Bevis, or Bevis Brothers, as the agent of appellant in the transaction; (2) were the note and mortgage delivered by Hays to Bevis, or Bevis Brothers, as the agent of said Hays for the purpose of having Bevis, or Bevis Brothers, as the agent of Hays and wife, find someone to loan Hays and wife money on the security of such note and mortgage: (3) assuming there was any such issue in the case, and the action could be regarded as one at law, brought on the extension agreement of date September 19, 1917, did Chapman, by the said agreement, assume and agree to pay the mortgage debt. On this question any inferences to be drawn would a question of fact for the District Court.

DIVERSITY OF CITIZENSHIP.

There being no diversity of citizenship between the mortgagors and the mortgagee, M. L. Bevis, under Section 24 of the Judicial Code of 1911 (Sec. 991 U. S. Comp. Stats.) the District Court was without jurisdiction to entertain the bill filed by appellant as assignee of the note and mortgage, unless the facts brought the case within some recognized exception.

Parker v. Ormsby, 141 U. S. 81.

Kolze v. Hoadley, 200 U. S. 76.

The presumption is against jurisdiction.

Commercial Trust Company v. Laurens County, 267 Fed. 901 (903).

Apparently, it is appellant's contention that jurisdiction existed on the theory that Bevis when he received the note and mortgage, acquired no beneficial interest in same, and was solely an agent of the mortgagors, Hays, for the purpose of borrowing money for Hays on the faith and security of such note and mortgage. The record, however, furnishes no support for such a contention. Neither Bevis or Hays testified that there was any such arrangement, or that there was any understanding that Bevis was to be under no obligation to personally

advance the money called for by the note and mortgage. Nor did either testify that there was any understanding that the payment of the money from Bevis was to be at all contingent upon Bevis finding a purchaser for the note and mortgage. Bevis testified as follows:

> "We did not have any arrangement with Mr. Hays that we were going to sell the mortgage and note * * * and there was no agreement between us and Mr. Hays that the payment to him was to be dependent upon whether we sold it or did not sell it." (Record 30-31.)

It is manifest from this testimony that the relation between Hays and Bevis upon the execution and delivery of the note and mortgage was that of creditor and debtor; Bevis became a debtor to Hays for the amount of the note and mortgage. Due to the uncertainty as to whether the mortgage would be found to be a first lien on the premises in question, the money was temporarily withheld.

> "* * * we probably wanted a few days to satisfy ourselves in regard to the title before we would pay out all of the money. There might have been some prior loan or judgment or taxes or something of that kind." (Record 31.)

There is nothing in the record which negatives the idea that the transaction was a closed one at the time the note and mortgage were delivered. Nothing remained to be done by Bevis but to pay.

A right of action, for the amount represented by the note, existed in favor of Hays and against Bevis, provided payment was not made, and this was not contingent in any respect upon whether Bevis was able to sell the note and mortgage to others.

In the case of Holmes v. Goldsmith, 147 U. S. 150, the note was an accommodation one in favor of the payee. The purpose was to enable the payee to raise money for himself, by selling the note with his endorsement. There was, therefore, never any indebtedness between the makers of the note and the payee. In Commercial Trust Company v. Laurens County, 267 Fed. 901; Kiven v. Virginia-Carolina Chemical Company, 145 Fed. 288, and Baltimore Trust Company v. Screven County, 238 Fed. 834, the notes were made payable to the payee therein named in order to permit such payee to act as agent for the maker in selling the notes and acquiring funds for the maker. There was, therefore, no indebtedness at any time from the maker to the payee, but the only indebtedness that ever existed was that of the maker in favor of the endorsees.

Under the uncontroverted facts, this case does not fall within the rule of any of the cases above mentioned, which have been cited by appellant. There is nothing in the record here that would support an inference, much less a finding, that Bevis was the agent of Hays to negotiate a sale of the note and mortgage, or that the relationship of debtor and

creditor did not exist between the parties. However, even if there was any evidence in this record, which would justify an inference that the relationship between Hays and Bevis was that of principal and agent, or that Bevis upon receipt of the note and mortgage did not become indebted to Hays for the amount thereof, nevertheless the question of fact, if an inference could be indulged, which would sustain the jurisdiction, has been decided by the District Court adversely to appellant.

The quotation from the application, Exhibit 4, found at page 10 of appellant's brief, does not aid appellant. The use of the words "and in the negotiation of the loan" apparently mean that Hays would pay all expenses in the event Bevis should conclude not to take the loan for any reason, if the security offered should not be as represented, or if Hays should later refuse to complete the loan. It is the stereotyped provision, which is generally found in printed applications for farm loans, certain portions not being of importance in this particular transaction since apparently Bevis had already agreed to make the loan and was already familiar with the security offered, and Hays had already accepted the loan, as evidenced by the execution at the same time of the note and mortgage. In this particular case the language quoted, as it appears in the application, would only be material in the event it should be later found that the mortgage did not create a first lien on the land.

The case of Page v. Town of Rochester, 137 Fed. 663, did not arise on the assignment of a right of action at all. It is said:

> "Williams' cause of action does not depend upon the assignment of a chose in action to him, but upon the assignment of a right to him, by which performance he acquired a chose in action to himself."

Other cases cited by appellant, we believe, require no notice. It is of course elementary that a principal may confer authority upon an agent to make a contract binding the principal, and it is also a well recognized principle that where there are conditions precedent to an obligation accruing against one party to a contract, a right of action does not arise until the conditions are performed. In this case had Bevis retained title to the mortgage papers, but failed to pay therefor, and later sued to recover on the note and mortgage, Hays could have defended by showing that the consideration had failed, due to Bevis failing to advance the money for the note and mortgage. In other words, the failure of Bevis to perform the conditions of his contract, when the time came for performance, would constitute a defense. Hays, however, would not have been limited to making this defense in an action brought by Bevis. He would have had a right of action against Bevis for the amount Bevis was to advance in consideration of the note and mortgage, which had already been delivered.

EFFECT OF EXTENSION AGREEMENT.

Appellant suggests (Brief 17) without any argument, that jurisdiction might be sustained on the extension agreement since that document was signed by Quincy D. Chapman and appellant. It is not claimed, however, that there was in this extension agreement any provision obligating Chapman to pay the mortgage debt. Unless there was in this extension agreement some provision creating an indebtedness from Chapman to appellant, then it would seem manifest that this could not be considered an action brought upon such extension agreement, and no relief could be given founded upon such agreement. The only importance of that document in this cause, is its bearing upon the question as to whether the statute of limitations had run. There is, however, no issue here as to the statute of limitations.

It will be observed that by the amended bill it is alleged that the mortgagors Hays executed two deeds to Chapman, and that the deeds contained provisions that Chapman assumed and agreed to pay the mortgage debt. (Par. 5 and 6, Record 16, 17.) These allegations in the bill are denied in the answer. (Record 23.) The purported deeds on which complainant relied to establish these allegations of the bill were not included in the praecipe for the record on appeal, nor are they attached to the record certified to this court, nor were the let-

ters written at the time of the purported deeds from Hays to Chapman showing that the deeds were in fact but mortgages, and that the deeds were not at any time exhibited to Chapman, included in the record certified to this Court. Appellant, therefore, apparently is not relying upon the said purported deeds in which, so appellant claims, there were assumption agreements. However, if appellant was relying upon such deeds, any assumption agreement therein contained would not vest jurisdiction in the District Court on the theory of a diversity of citizenship. The purported deeds were from Hays and wife, citizens of the State of Washington, to Chapman, likewise a citizen of the State of Washington. The right, if any, of appellant, to obtain any relief, based upon any such alleged assumption agreement would be simply an equity in the nature of subrogation to have applied upon the debt of the mortgagors, any amount which, under the purported assumption agreement contained in such deeds, should have been paid by the grantee. The doctrine, on which relief will be afforded a mortgagee, in such a case, is for the protection of the grantor in the deed, and not for the protection of the grantor's creditors. Opie v. Pacific Investment Company, 26 Wash. 505, 513-516; Keller v. Ashford, 133 U. S. 610; Union Mutual Life Insurance Company v. Hanford, 143 U. S. 187. The appellant would be merely an equitable assignee of the grantors in the deeds. American Water Works & Guaranty Company v. Home Water Company, 115 Fed. 171, 176.

Whether complainant's remedy against Chapman, assuming there was any such assumption agreement in the deeds, would be at law or in equity, would be controlled by the law of the place where the suit was brought. Union Mutual Life Insurance Company v. Hanford, *Supra;* Willard v. Wood, 135 U. S. 309.

If appellant is contending that the District Court had jurisdiction of this cause, on the theory that the action was brought on the extension agreement of September 19, 1917, to which agreement the mortgagors Hays, appellant, and Chapman were all parties, it would seem manifest that such contention is without merit. Apparently this theory was not advanced in the District Court, since in the memorandum opinion of the District Judge it appears that the contention there made was that jurisdiction might be sustained under the alleged assumption agreement contained in the deeds. (Record 49.) The claim presented by appellant to the executor, and which was a prerequisite to the institution of this action against the executor, was founded apparently on the theory that the indebtedness was a note and mortgage. The gravamen of the amended bill is the note and mortgage. Otherwise the note would be of no importance, except for the purpose of fixing the amount of the debt; the mortgage would be of no importance whatever and respondents Millard F. Chapman and Mrs. H. Ferry would not be proper

parties to the action at all, since neither signed the extension agreement. It will be further observed that the relief demanded is on the theory that the action is on the note and mortgage since it is sought to have the mortgage foreclosed, the property sold and rspondents Millard F. Chapman and Mrs. H. Ferry, as well as respondent Sexton, executor, barred and foreclosed as to any rights in the real estate covered by the mortgage.

If it could be said that the gravamen of this action was the extension agreement, and the necessary diversity of citizenship existed as between appellant and Chapman, nevertheless the right of action against respondents Millard F. Chapman and Mrs. H. Ferry necessarily would be upon the note and mortgage, since they were not in any manner parties to the extension agreement, nor obligated thereunder, and jurisdiction could not be sustained as to them. However, when the said extension agreement is examined it appears therefrom that Quincy D. Chapman, by executing that document, did not become personally obligated to appellant, or any other person. The language of the document discloses no intention on the part of Quincy D. Chapman to assume the payment of the mortgage debt. In fact the language negatives the idea of any personal indebtedness, since it is there provided that the "said J. W. Hays and Lillie G. Hays remain liable and bound by the said note and mortgage" in all the respective terms and provisions.

The only provision in the document on which appellant might attempt to argue that Quincy D. Chapman obligated himself to pay the debt is the following:

> "* * * and it is further agreed by all the parties hereto, that all the other terms, provisions and conditions of the said note and mortgage in and all hereto shall be binding and obligatory upon the respective parties hereto, and upon the said land described herein and the said mortgage shall remain a lien upon said lands in all particulars and be of the same force and effect as if the time of payment of the said note and mortgage were originally made payable on the first day of January, 1923, instead of on the first day of January, 1918 * * *" (Record 8).

It will be observed, that in the above quoted portion, there is no language indicating that Quincy D. Chapman was obligating himself to pay the mortgage debt. The provision is simply the usual one for the purpose of making clear that none of the terms or provisions of the original document are changed by the extension agreement, except the date of payment. In other words, instead of the mortgage being due and payable on January 1, 1918, such due date should be January 1, 1923, which would operate to protect the owner of the property against a prior foreclosure, and the mortgagee against the statute of limitations commencing to run until that date. Except with the change of date, the note and mortgage were binding and obligatory as therein provided, as of the date they were executed.

The burden of proving that Quincy D. Chapman entered into an agreement with appellant whereby he assumed and agreed to pay the mortgage debt was on complainant.

The fact that the land was conveyed to Quincy D. Chapman, subsequent to the giving of the mortgage, raises no inference that he at any time obligated himself to pay the mortgage debt. Whether this question is considered from the standpoint of an assumption of mortgage provision in a deed of conveyance, or of an assumption agreement in a separate instrument between the grantee of the mortgagor and the mortgagee, in order to hold the grantee for the mortgage debt, the intent to assume the mortgage must appear clear from the language used and can not be established by inferences. Pingrey on Mortgages, (1893 Ed.) Sec. 1020; Jones on Mortgages (7th Ed.) Sec. 748; Ordway v. Downey 18 Wash. 412. The liability would still be the indebtedness secured by the mortgage. Roberts v. Fitzalen, 52 Pac. (Calif.) 818. In effect the grantee would be substituted for the maker of the note. Since the right of action would be still on the note and mortgage, the grantee being simply substituted for the original mortgagor, the assumption agreement between citizens of different states would not create a diversity of citizenship, where it did not exist before.

If this extension agreement, assuming jurisdiction could be based thereon, could be aided by extrinsic evidence, or by inferences to be drawn fr such document, the District Court, in determining the jurisdictional question, necessarily had to determine whether Quincy D. Chapman had, or had not, by executing the extension agreement, obligated himself to appellant for the payment of the mortgage debt. The findings of the District Court, upon this question of fact, would not be subject to review, if the action is treated as one at law, if there is any evidence upon which the finding could be made. Or, if the cause is treated as one in equity, the finding of the District Court would not be held erroneous, unless manifestly against the weight of the evidence.

We submit that the District Court was without jurisdiction as to each and all of the respondents and that the judgment dismissing the action should be affirmed.

Respectfully submitted,

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